UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ROBERT L. WELCH, Plaintiff, v. JO ANNE B. BARNHART, Commissioner of Social Security Defendant.	CASE NO. C06-0345-JLR REPORT AND RECOMMENDATION RE: SOCIAL SECURITY DISABILITY APPEAL

Plaintiff Robert L. Welch proceeds through counsel in his appeal of a final decision of the Commissioner of the Social Security Administration (Commissioner). The Commissioner partially denied plaintiff's application for Supplemental Security Income (SSI) benefits and Disability Insurance (DI) benefits after a hearing before an Administrative Law Judge (ALJ).

FACTS AND PROCEDURAL HISTORY

Plaintiff was born on XXXX, 1955.[1] He completed high school and took some welding classes at a technical college. (AR 213-14) Plaintiff previously worked as a mockup mechanic,

[1] Plaintiff's date of birth is redacted back to the year of birth in accordance with the General Order of the Court regarding Public Access to Electronic Case Files, pursuant to the official policy on privacy adopted by the Judicial Conference of the United States.

painter, production welder, and acid bath welder.

Plaintiff filed an application for SSI and DI benefits in May 2002, alleging disability since January 15, 2002 due to knee problems. (AR 3, 61-64) His applications were denied initially and on reconsideration, and he timely requested a hearing.

On March 21, 2005, ALJ Donald P. Krainess held a hearing, taking testimony from plaintiff and vocational expert (VE) William Weiss. (AR 193-231) On May 27, 2005, ALJ Krainess issued a decision finding plaintiff not disabled from January 15, 2002 to December 31, 2004 and disabled after January 1, 2005. (AR 19-26)

Plaintiff timely appealed. The Appeals Council denied plaintiff's request for review on January 17, 2006, making the ALJ's decision the final decision of the Commissioner. (AR 6-9) Plaintiff appealed this final decision of the Commissioner to this Court.

DISCUSSION

The Commissioner follows a five-step sequential evaluation process for determining whether a claimant is disabled. *See* 20 C.F.R. §§ 404.1520, 416.920. At step one, it must be determined whether the claimant is gainfully employed. The ALJ found plaintiff had not engaged in substantial gainful activity since his alleged onset date. At step two, it must be determined whether a claimant suffers from a severe impairment. The ALJ found plaintiff's degenerative joint disease of his right knee severe. Step three asks whether a claimant's impairments meet or equal a listed impairment. The ALJ found that plaintiff's impairments did not meet or equal the criteria for any listed impairments. If a claimant's impairments do not meet or equal a listing, the Commissioner must assess residual functional capacity (RFC) and determine at step four whether the claimant has demonstrated an inability to perform past relevant work. The ALJ assessed

plaintiff's RFC and found him unable to perform his past relevant work. If a claimant demonstrates an inability to perform past relevant work, the burden shifts to the Commissioner to demonstrate at step five that the claimant retains the capacity to make an adjustment to work that exists in significant levels in the national economy. If a claimant is between fifty and fifty-four years old, and has no transferable skills from past relevant work, the medical vocational rules requires the claimant to be found disabled. 20 C.F.R. Pt. 404, Subpt. P, App. 2, Rule 201.14. The ALJ found plaintiff capable of making an adjustment to work existing in significant numbers in the national economy, including work as a table sorter, semi conductor bonder, charge account clerk, and call out operator. The ALJ also found plaintiff to have no transferable skills from past relevant work. Thus, the ALJ found plaintiff not disabled prior to his fiftieth birthday, and disabled after his fiftieth birthday.

This Court's review of the ALJ's decision is limited to whether the decision is in accordance with the law and the findings supported by substantial evidence in the record as a whole. *See Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993). Substantial evidence means more than a scintilla, but less than a preponderance; it means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th Cir. 1989). "Where the evidence is susceptible to more than one rational interpretation, one of which supports the ALJ's decision, the ALJ's conclusion must be upheld." *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002).

Plaintiff argues that the ALJ erred by failing to consider the effect of plaintiff's obesity, making an adverse credibility finding, relying on VE testimony that was inconsistent with the Dictionary of Occupational Titles (DOT), and rejecting two physicians' assessments that plaintiff

cannot stand or walk at work. In addition, plaintiff claims that a physician's declaration submitted only to the Appeals Council proves that the ALJ's decision is not supported by substantial evidence. Plaintiff requests remand for further administrative proceedings. The Commissioner argues that the ALJ's decision is supported by substantial evidence and should be affirmed.

Obesity

A claimant bears the burden of proving his disability and an ALJ will only consider impairments raised by a claimant or about which the ALJ receives evidence. 20 C.F.R. §§ 404.1512(a), 416.912(a). However, "[t]he ALJ always has a 'special duty to fully and fairly develop the record and to assure that the claimant's interests are considered ... even when the claimant is represented by counsel.'" *Celaya v. Halter*, 332 F.3d 1177, 1183 (9th Cir. 2003) (quoting *Brown v. Heckler*, 713 F.2d 441, 443 (9th Cir. 1983)). "When a claimant is not represented by counsel, this responsibility is heightened." *Id.* (citing *Higbee v. Sullivan*, 975 F.2d 558, 561 (9th Cir. 1992)).

In *Celaya*, the Ninth Circuit remanded for further administrative proceedings when an ALJ failed to consider the effect of the claimant's obesity, despite the fact that the claimant never mentioned her obesity or claimed that it impaired her functioning. *Id.* at 1181-83. The court gave three reasons for doing so. First, the court stated that obesity was "implicitly" raised in the claimant's report of symptoms because her reported height and weight revealed a Body Mass Index (BMI) of at least 44, which qualified as "extremely obese." *Id.* at 1179, 1182. Second, at the time of the hearing, obesity still qualified as a listed impairment, and it was clear from the record that the claimant's weight was close to qualifying as a listed impairment, and was a

condition that would exacerbate her reported illnesses.[2] *Id.* at 1182. Third, the claimant was not represented by counsel and the ALJ bore a heightened responsibility to develop the record as a result. *Id.* at 1182-83.

Despite the fact that he never mentioned his obesity or claimed that it impaired his functioning, plaintiff argues that the ALJ erred by failing to consider the aggravating or combined effect of his obesity on his knee condition. *See* Social Security Ruling (SSR) 02-1p at *6 ("The combined effects of obesity with other impairments may be greater than might be expected without obesity."); 20 C.F.R. §§ 404.1523, 404.1545(e) (requiring consideration of the effect of combination of impairments). Plaintiff is seventy or seventy-one inches tall (AR 124, 138), and weighed between 240 and 279 pounds during the period between January 15, 2002 and December 31, 2004 (AR 73, 176). This equates to a BMI between thirty-three and forty.[3] A BMI of thirty or greater indicates obesity and a BMI of forty or greater indicates "extreme" obesity. SSR 02-1p at *2. Thus, plaintiff varied from obesity to extreme obesity during the period in question.

The Commissioner argues that *Celaya* does not apply in the instant case. The Commissioner cites the Ninth Circuit's decision distinguishing *Celaya* in *Burch v. Barnhart*, 400 F.3d 676 (9th Cir. 2005). In *Burch*, the court declined to remand for further administrative proceedings, despite the fact that the ALJ had failed to address the claimant's obesity, because there was no evidence that the claimant's obesity exacerbated her other impairments, and because the claimant was represented by counsel at her hearing. *See id.* at 681-83. The court placed

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[2] Obesity is no longer a listed impairment. Revised Medical Criteria for Determination of Disability, Endocrine System and Related Criteria, 64 Fed. Reg. 46,122 (Aug. 24, 1999).

[3] BMI from tables at http://www.nhlbi.nih.gov/guidelines/obesity/bmi_tbl.htm.

particular significance on the presence of counsel. *Id.* at 682.

Neither plaintiff, nor any reporting physician raised plaintiff's obesity as an issue with respect to plaintiff's impairment. The record is devoid of any evidence that plaintiff's impairment has been adversely affected by his obesity. Also, the ALJ concluded that the claimant*did* have a knee impairment, which was the only impairment there was any medical evidence of, that was severe and which restricted him to sedentary work. Given plaintiff's failure to raise the issue of obesity himself, the lack of medical evidence suggesting plaintiff's obesity affected his impairment, and the fact that plaintiff was represented by counsel, the ALJ did not err in failing to address plaintiff's obesity.[4]

Credibility

Absent evidence of malingering, an ALJ must provide clear and convincing reasons to reject a claimant's testimony. *See Vertigan v. Halter*, 260 F.3d 1044, 1049 (9th Cir. 2001). In finding a social security claimant's testimony unreliable, an ALJ must render a credibility determination with sufficiently specific findings, supported by substantial evidence. "General findings are insufficient; rather, the ALJ must identify what testimony is not credible and what evidence undermines the claimant's complaints." *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1995). "We require the ALJ to build an accurate and logical bridge from the evidence to her conclusions so that we may afford the claimant meaningful review of the SSA's ultimate findings." *Blakes v. Barnhart*, 331 F.3d 565, 569 (7th Cir. 2003). "In weighing a claimant's credibility, the

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[4] Because the undersigned concludes that the ALJ did not err in failing to address plaintiff's obesity, this Court need not address the Commissioner's alternative argument that the ALJ's failure to consider plaintiff's obesity is harmless because the ALJ implicitly accommodated the condition by limiting plaintiff to sedentary work where he may sit or stand at his will.

ALJ may consider his reputation for truthfulness, inconsistencies either in his testimony or between his testimony and his conduct, his daily activities, his work record, and testimony from physicians and third parties concerning the nature, severity, and effect of the symptoms of which he complains." *Light v. Social Sec. Admin.*, 119 F.3d 789, 792 (9th Cir. 1997).

In this case, the ALJ rendered the following credibility determination:

> The weight of the objective evidence demonstrates that the claimant's allegations of limitation due to right knee osteoarthritis from January 15, 2002 to December 31, 2004 are not entirely credible considering the criteria set forth in Social Security Ruling 96-7p.
> ...
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> The claimant testified at the hearing that due to continued problems with the right knee, he had difficulty standing, he lied down 2-3 hours in the afternoon, and he was limited to driving 15 minutes at a time, and walking ½ - 3/4 of a block. Treatment for the knee prior to establishing care by Dr. Roter in February 2004 is minimal. The objective evidence confirmed functional difficulties because of the knee, but he was not precluded from all work-related activities. According to his own statements, he remained capable of lifting and carrying 10 pounds, preparing his own meals, shopping for groceries, cleaning his house, washing dishes, and doing laundry. In fact, he independently provided care for an elderly sister who lived with him. Evidence from his treating physician and his ability to engage in said daily activities indicates that the claimant was not limited to the degree he alleges.

(AR 22 (internal citations to record omitted))

Plaintiff challenges the ALJ's adverse credibility finding by stating that "Welch's minimal daily activities interspersed with rest did not disprove her [sic] claim of disability." (Dkt. 10 at 18) Plaintiff also cites *Vertigan*, 260 F.3d at 1050, which states: "This court has repeatedly asserted that the mere fact that a plaintiff has carried on certain daily activities, such as grocery shopping, driving a car, or limited walking for exercise, does not in any way detract from her credibility as to her overall disability."

The ALJ, however, did not rely on the mere fact of ordinary daily activities in making his

credibility determination. He relied upon three additional pieces of evidence. First, he relied upon plaintiff's minimal treatment prior to establishing care with Dr. Roter in 2004. *C.f. Burch*, 400 F.3d at 681 ("The ALJ is permitted to consider lack of treatment in his credibility determination."). The only treatment during that time appears to be a single meeting with Dr. Medina in January 2002. (AR 135) Also, plaintiff took only Tylenol for his pain. (AR 206) This level of treatment appears inconsistent with plaintiff's reported symptoms. Second, the ALJ relied upon the inconsistency of plaintiff's testimony with the opinion of Dr. Roter, his treating physician. *See* SSR 96-7p at *5 ("One strong indication of the credibility of an individual's statements is their consistency, both internally and with other information in the case record."). Plaintiff's reported limitations are inconsistent with Dr. Roter's opinion that plaintiff could do sedentary work. (AR 156, 163) Third, the ALJ relied upon plaintiff's provision of care for his elderly sister. Accordingly, the ALJ's credibility determination is supported by substantial evidence and should be upheld.[5]

Vocational Expert Testimony

If a VE's testimony conflicts with the DOT, the ALJ must "obtain a reasonable explanation for the apparent conflict." SSR 00-4p at *4. An ALJ may rely on VE testimony that conflicts with the DOT only if there is "persuasive evidence to support the deviation." *Johnson v. Shalala*, 60 F.3d 1428, 1435 (9th Cir. 1995).

Plaintiff alleges that the VE's testimony was inconsistent with the DOT. Plaintiff identifies

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[5] In response, plaintiff argues that the Commissioner misstates the ALJ's rationale in arguing that the ALJ found plaintiff "untruthful." A review of the Commissioner's response brief, however, indicates that the Commissioner's argument was limited to an assessment of plaintiff's credibility, which does not necessarily infer lack of truthfulness.

the alleged inconsistency as follows: "The vocational expert purported to identify three (or four) 'sedentary' DOT jobs that allowed a claimant to sit or stand at his option. However, a 'sedentary' DOT job requires sitting for prolonged periods of two hours: 'In order to perform a full range of sedentary work, an individual must be able to remain in a seated position for approximately 6 hours of an 8-hour workday, with a morning break, a lunch period, and an afternoon break at approximately 2-hour intervals. . . .' SSR 96-9p." (Dkt. 10 at 17 (internal citations to record omitted))

However, plaintiff fails to identify any inconsistency between the VE's testimony and the DOT. Plaintiff recites the sitting requirement for a full range of sedentary work.*See* SSR 96-9p at *6. Yet, the ALJ explicitly disclaimed a finding that plaintiff could perform a full range of sedentary work. (AR 25 ("[T]he claimant's exertional limitations do not allow him to perform the full range of sedentary work[.]")) Moreover, in accordance with the ALJ's hypothetical, the VE only purported to identify a subset of sedentary jobs that would allow plaintiff to sit or stand at will. (AR 225) In fact, SSR 96-9p clarifies that when a claimant cannot do the sitting or standing required by sedentary work a VE should be consulted to determine what jobs would be appropriate, which is precisely what was done here. *See* SSR 96-9p at *7. Plaintiff also fails to identify any inconsistency between the VE's testimony and the DOT job descriptions for the positions identified. *See* DOT 739.687-182,[6] 726.685-066, 205.367-014. Accordingly, the ALJ's decision should be upheld.

[6] The VE mistakenly cited DOT "739.689-182" for "table sorter." (AR 225)

Physicians' Opinions

In general, more weight should be given to the opinion of a treating physician than to a non-treating physician, and more weight to the opinion of an examining physician than to a non-examining physician. *Lester*, 81 F.3d at 830. Where not contradicted by another physician, a treating or examining physician's opinion may be rejected only for "'clear and convincing'" reasons. *Id.* (quoting *Baxter v. Sullivan*, 923 F.2d 1391, 1396 (9th Cir. 1991)). Where contradicted, a treating or examining physician's opinion may not be rejected without "'specific and legitimate reasons' supported by substantial evidence in the record for so doing." *Id.* at 830-31 (quoting *Murray v. Heckler*, 722 F.2d 499, 502 (9th Cir. 1983)). Where the opinion of the treating physician is contradicted, and the non-treating physician's opinion is based on independent clinical findings that differ from those of the treating physician, the opinion of the non-treating physician may itself constitute substantial evidence. *See Andrews v. Shalala*, 53 F.3d 1035, 1041 (9th Cir. 1995). It is the sole province of the ALJ to resolve this conflict. *Id.*

A. Dr. Roter's and Dr. Wilson's Standing and Walking Assessments

Plaintiff alleges that the ALJ erred by not giving legally sufficient reasons for rejecting the opinions of treating physician Dr. Brad Roter and examining physician Dr. Clyde Wilson that plaintiff could not do the standing and walking required by sedentary work. The ALJ found that "claimant's exertional limitations do not allow him to perform the full range of sedentary work[.]" (AR 25) However, the ALJ found plaintiff's RFC to be the following: "lift and carry 20 pounds occasionally; lift and carry 10 pounds frequently; *stand and/or walk at least 2 hours in 8-hour workday*; sit about 6 hours in an 8-hour workday; push and/or pull without limitation; climb ramps and stairs occasionally; and balance occasionally." (AR 25 (emphasis added)) "The full range of

sedentary work requires that an individual be able to stand and walk for a total of approximately 2 hours during an 8-hour workday." SSR 96-9p.

Plaintiff's argument fails with respect to Dr. Roter. Dr. Roter wrote on his June and November 2004 opinions that plaintiff's "overall work level" was "sedentary work." (AR 156, 163) He wrote this just above the following definition for sedentary work: "the ability to lift 10 pounds maximum and frequently lift and/or carry such articles as files and small tools. A sedentary job may require sitting, walking and standing for brief periods." (AR 156, 163) This portion of the opinions is consistent with the ALJ's findings. In fact, the ALJ stated that he concurred with Dr. Roter's conclusions and afforded them great weight. (AR 22)

However, plaintiff emphasizes a different section of Dr. Roter's opinions, where Dr. Roter indicated that plaintiff's knee condition was "severe" and lists standing, walking, and lifting as "affected work activities." (AR 156, 163) Just above this section, "severe" is defined as "[i]nability to perform one or more basic work-related activities[.]" (AR 156, 163) Plaintiff interprets this section as indicating that he was unable to stand, walk, or lift, thus rendering Dr. Roter's opinions inconsistent with the ALJ's findings concerning plaintiff's RFC. (Dkt. 10 at 14)

The ALJ's decision will not be overturned unless there is no rational interpretation of the evidence that supports the ALJ's decision. *Thomas*, 278 F.3d at 954. Here, it would be rational for the ALJ to interpret Dr. Roter's opinions as indicating that plaintiff was capable of sedentary work, as that is what Dr. Roter explicitly wrote, while regarding the other notations as indicating that plaintiff's knee condition affects plaintiff's ability to walk, stand and lift, and is severe enough to render plaintiff unable to perform some work-related activities. This is particularly reasonable in light of the fact that there is no evidence that plaintiff is unable to stand or walk and there are

repeated references in the record to plaintiff walking. (AR 124, 137-38, 207) Thus, the ALJ's decision with respect to Dr. Roter's June and November 2004 opinions should be upheld.[7]

The ALJ's treatment of Dr. Wilson's July 2003 opinion is a more difficult issue. In the section where the physician is asked to check a box indicating the exertional level the person can perform, Dr. Wilson put a bracket around the boxes for "sedentary work" and "severely limited," defined as "unable to lift at least 2 pounds or unable to stand and/or walk," and checked "severely limited." (AR 177) Thus, it is ambiguous what exertional level Dr. Wilson selected. Immediately following this section, Dr. Wilson wrote: "Standing/walking limited to 5 minutes every 2 hours. May not drive as part of job duties. No stairs."[8] (*Id.*) Dr. Wilson is not mentioned anywhere in the ALJ's opinion. While Dr. Wilson's opinion is contradicted by other physicians' opinions, plaintiff correctly argues that this is error because an ALJ may only reject a contradicted examining physician's opinion if he gives specific, legitimate reasons supported by substantial evidence. *See Lester*, 81 F.3d at 830-31.

The Commissioner appears to argue that the ALJ did not need to consider Dr. Wilson's reports because they were inauthentic and unsupported. However, his argument is an improper post hoc rationalization. *See Connett v. Barnhart*, 340 F.3d 871, 874 (9th Cir. 2003). The Commissioner also argues that an ALJ does not need to accept a treating physician's opinion that

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[7] Plaintiff attacks as a post hoc rationalization the Commissioner's alleged claim that the ALJ properly rejected Dr. Roter's opinion because it was internally inconsistent. However, the Commissioner merely stated that, *if* plaintiff's interpretation were true, Dr. Roter's report would be internally inconsistent.

[8] It should be noted that Dr. Wilson examined plaintiff again in January 2004 and clearly indicated that plaintiff was capable of sedentary work, without mention of the standing and walking limitations described in his July 2003 opinion. (AR 168)

is conclusory, brief, and unsupported by clinical findings. *See Tonapetyan v. Halter*, 242 F.3d 1144, 1149 (9th Cir. 2001). While this is true, the ALJ in the instant case gave no reason for rejecting Dr. Wilson's opinion, and thus this argument is also an improper post hoc rationalization. *See Connett*, 340 F.3d at 874. Finally, the Commissioner argues that the failure to explicitly discuss Dr. Wilson's opinion was harmless error. *See Burch*, 400 F.3d at 679 ("A decision of the ALJ will not be reversed for errors that are harmless.")

The Ninth Circuit recently addressed at length its treatment of harmless error in *Stout v. Commissioner, Soc. Sec. Admin.*, 454 F.3d 1050 (9th Cir. 2006). After reviewing Ninth Circuit law on harmless error in the social security context, the *Stout* court noted two common threads in cases where an ALJ's error was held harmless. First, it noted that the ALJ's error in each case "was inconsequential to the ultimate nondisability determination." *Id.* at 1055. Second, it stated that the Ninth Circuit had never found an ALJ's "silent disregard of lay testimony about how an impairment limits a claimant's ability to work," which was the error at issue, to be harmless. *Id.* at 1055-56. As a result, the court held: "[W]here the ALJ's error lies in a failure to properly discuss competent lay testimony favorable to the claimant, a reviewing court cannot consider the error harmless unless it can confidently conclude that no reasonable ALJ, when fully crediting the testimony, could have reached a different disability determination."[9] *Id.* at 1056. The court then explained why the ALJ's error was not harmless. One reason of particular significance to the instant case was:

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[9] While the *Stout* court applied harmless error in the context of disregarded lay testimony, it recognized that harmless error was not limited to that area, as it relied on Ninth Circuit cases finding harmless error with respect to credibility determinations, findings regarding a claimant's age, applications of medical-vocational tables, among others. *See Stout*, 454 F.3d at 1054-55.

> [W]e cannot say the ALJ's error here was nonprejudicial to [claimant]. Based on his RFC determination and *the VE's response to a hypothetical–which both failed to account for lay testimony about how [claimant's] impairments negatively affect his ability to work*–the ALJ found [claimant] could return to his previous work and was, therefore, not disabled.

Id. at 1056 (emphasis added).

While the Ninth Circuit has not directly addressed harmless error with respect to the improper handling of a physician's opinion, other circuits have. The Sixth Circuit has held that an ALJ's failure to explicitly consider a treating physician's opinion was harmless error because the hypothetical posed to the VE by the ALJ included the limitations found by the physician. *See Heston v. Comm'r of Soc. Sec.*, 245 F.3d 528, 536 (6th Cir. 2001). Similarly, the Seventh Circuit has held that an ALJ's improper rejection of a treating physician's opinion is not reversible error if the ALJ included that physician's limitations in his hypothetical to the VE. *See Shramek v. Apfel*, 226 F.3d 809, 814-15 (7th Cir. 2000).

At the hearing in the instant case, the ALJ concluded his hypothetical to the VE by asking: "So can you identify any sedentary work like that that would be unskilled and permit the individual to sit or stand at will?" (AR 225) This question accommodated Dr. Wilson's opinion that plaintiff could stand and walk for only five minutes every two hours. The VE responded by identifying the three positions relied upon by the ALJ at step five to determine that plaintiff was not disabled. (AR 24, 225-26) The ALJ later asked the VE with respect to one of the positions: "And this can be done efficiently either from a standing or sitting position?" (AR 225) The VE responded affirmatively. (AR 226) Thus, while the ALJ failed to address Dr. Wilson's opinion, this omission was harmless, as the positions the ALJ relied upon at step five were consistent with the limitations found by Dr. Wilson. Accordingly, the ALJ's decision should be upheld with respect to Dr.

Wilson's July 2003 opinion.

B. Dr. Roter's July 2005 Declaration

After the ALJ's partially favorable decision on May 27, 2005, plaintiff submitted a declaration by Dr. Roter dated July 13, 2005 to the Appeals Council in support of plaintiff's appeal. (AR 184-92) Dr. Roter's declaration stated that it would be reasonable to find that plaintiff's limitations have prevented him from engaging in full time sedentary work since January 2002. (AR 188) The Appeals Council rejected the declaration because Dr. Roter did not examine plaintiff until February 2004 and the July 2005 declaration conflicts with his statements in June and November 2004 that plaintiff could do sedentary work, and because Dr. Roter's comments that plaintiff needed to elevate his legs appeared inconsistent with Dr. Roter's previous reports and reports by other physicians that plaintiff could not extend or straighten his right knee. (AR 7)

As an initial matter, the Commissioner argues that this Court may not remand for further administrative proceedings due to new evidence because the requirements of "sentence six" of 42 U.S.C. § 405(g) are not met. Under sentence six, a court "may at any time order additional evidence to be taken before the Commissioner of Social Security, but only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding[.]" 42 U.S.C. § 405(g). However, the cases the Commissioner cites in support of her claim that Dr. Roter's July 2005 declaration may only be reviewed under sentence six are inapposite. *See Mayes v. Massanari*, 276 F.3d 453, 461 n.3 (9th Cir. 2001) (declining to decide whether good cause is required for submission of new evidence because claimant conceded that good cause was required); *Key v. Heckler*, 754 F.2d 1545, 1551 (9th Cir. 1985) (applying sentence six where claimant submitted new evidence to the

Ninth Circuit); *Burton v. Heckler* 724 F.2d 1415, 1416-18 (9th Cir. 1984) (applying sentence six and remanding for further consideration of new evidence submitted to the Appeals Council *as well as* additional new evidence submitted to the district court). In none of these cases did the Ninth Circuit hold that new evidence submitted to the Appeals Council must meet the requirements of sentence six to be reviewed by the District Court.

While the Ninth Circuit has not directly addressed the issue, it appears appropriate for this Court to review evidence submitted to the Appeals Council under "sentence four" of § 405(g), which states that "[t]he court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or without remanding the cause for a rehearing," rather than sentence six. *See Harman v. Apfel*, 211 F.3d 1172, 1180 (9th Cir. 2000) ("We properly may consider the additional materials because the Appeals Council addressed them in the context of denying Appellant's request for review."; remanding for further consideration of the evidence, including that submitted to the Appeals Council, without mention of whether such evidence must be new, material, or previously omitted for good cause); *Ramirez v. Shalala*, 8 F.3d 1449, 1451-52 (9th Cir. 1993) ("Although the ALJ's decision became the Secretary's final ruling when the Appeals Council declined to review it, the government does not contend that the Appeals Council should not have considered the additional report submitted after the hearing, or that we should not consider it on appeal. Moreover, although the Appeals Council 'declined to review' the decision of the ALJ, it reached this ruling after considering the case on the merits; examining the entire record, including the additional material; and concluding that the ALJ's decision was proper and that the additional material failed to 'provide a basis for changing the hearing decision.' For these reasons, we

consider on appeal both the ALJ's decision and the additional material submitted to the Appeals Council."). Given the absence of any discussion or consideration of good cause or materiality, both *Ramirez* and *Harman* can be read to implicitly allow for consideration of Appeals Council evidence pursuant to sentence four. Accordingly, this Court shall consider Dr. Roter's July 2005 declaration.

The Commissioner then appears to argue that the Appeals Council's decision to reject Dr. Roter's July 2005 declaration is supported by substantial evidence. (Dkt. 12 at 10-12) As indicated above, the Appeals Council noted: "Dr. Roter did not examine [plaintiff] until February 2004 and this opinion conflicts with his statements in June and November 2004 that [plaintiff] could do sedentary work." (AR 7) The Commissioner appears to argue that retrospective opinions based on the notes of another physician are entitled to less weight. (Dkt. 12 at 10) Plaintiff correctly points out that Dr. Roter examined him during the relevant time period (January 15, 2002 to December 31, 2004), and that retrospective opinions are neither improper, nor irrelevant, *see Smith v. Bowen*, 849 F.2d 1222, 1225-26 (9th Cir. 1988). However, Dr. Roter's July 2005 declaration is inconsistent with his prior opinions. As stated above, in June and November 2004, Dr. Roter completed opinion forms indicating that plaintiff was capable of sedentary work. (AR 156, 163) In his July 2005 declaration, Dr. Roter was asked: "Since January 15, 2002, do you believe that Mr. Welch was capable of sedentary work, which involves standing or walking two out of eight hours, sitting up six out of eight hours, and lifting up to 10 pounds during one-third of the day?" (AR 188) Dr. Roter answered negatively. (AR 188) Plaintiff argues that the opinions are consistent because Dr. Roter never explicitly stated in the June and November 2004 opinions how long plaintiff could sit. Yet, the June and November 2004 opinions

indicated that Dr. Roter believed plaintiff was capable of sedentary work, which necessarily implied how long plaintiff could sit. (*See* AR 156, 163)

Additionally, Dr. Roter checked boxes on the June and November 2004 opinion forms indicating plaintiff had restricted mobility, agility, or flexibility in the following areas: balancing, bending, climbing, crouching, kneeling, pulling, pushing, and stooping. (AR 156, 163) Dr. Roter did not check the boxes for handling, reaching, or *sitting* (AR 156, 163), thus indicating Dr. Roter believed plaintiff could sit without limitation. However, in his July 2005 declaration, Dr. Roter was asked: "[Plaintiff] also reports that he cannot sit for more than an hour at a time due to his knee pain causing him to have to elevate his legs tow [sic] waist height for 30 minutes at a time. Is that reasonable?" (AR 186) Dr. Roter responded affirmatively. (AR 186) The July 2005 declaration is, thus, also inconsistent with the June and November opinions regarding plaintiff's ability to sit.

The Appeals Council also stated: "Dr. Roter's comments that you need to elevate your legs with the knees extended also appears inconsistent with his previous reports and those by other physicians that you could not extend or straighten your knee." (AR 7) Plaintiff does not challenge the Appeals Council's statement that plaintiff could not extend or straighten his knee. Rather, plaintiff takes issue with the Appeals Council and Commissioner's alleged claim that "a person cannot elevate a leg if the person cannot extend or straighten that extremity." (Dkt. 13 at 6)

The Appeals Council and Commissioner make no such claim. Instead, they point out that Dr. Roter's statement in his July 2005 declaration that plaintiff needed to relieve the swelling in his knee after sitting for thirty minutes "by elevating his legs and extending the knees," (AR 186), is inconsistent with Dr. Ho's February 2003 examination report, which states: "The claimant is

unable to straighten his right knee" (AR 139). In addition, no other physician report, including Dr. Roter's earlier reports, indicated that plaintiff needed to elevate or extend his left leg or knee. Also, as mentioned above, Dr. Roter had previously indicated that plaintiff could sit without limitation. (AR 156, 163) Accordingly, Dr. Roter's July 2005 declaration is inconsistent with prior medical evidence concerning plaintiff's ability and need to elevate and extend his knee. Given the above inconsistencies, plaintiff fails to demonstrate that the Appeals Council erred in finding that Dr. Roter's July 2005 declaration did not provide a sufficient basis for changing the ALJ's decision.

CONCLUSION

For the reasons described above, this matter should be AFFIRMED. A proposed order accompanies this Report and Recommendation.

DATED this 1st day of September, 2006.

Mary Alice Theiler
United States Magistrate Judge